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In The

Supreme Court of the United States

October Term, 1996

TRACTOR SUPPLY COMPANY, INC.,

Petitioner,

v.

VINCENT L. PRYNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF TRACTOR SUPPLY COMPANY'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE

The Illinois Chamber of Commerce ("Chamber") submits this brief in support of Tractor Supply Company's Petition for Writ of Certiorari,[1] and urges this Court to consider the following Question Presented:

> Whether a voluntary agreement to arbitrate federal statutory employment discrimination claims is enforceable under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), notwithstanding that it is part of a collective bargaining agreement.

Tractor Supply Co. Pet. for Cert., at i. Both Petitioner Tractor Supply Company ("TSC") and Respondent Vincent Pryner have consented to the Chamber's filing of this brief, pursuant to Sup. Ct. R. 37.2(a).[2]

The Illinois Chamber of Commerce is an organization representing employers with businesses or operations in the State of Illinois. Its 4000 members include businesses of every size and in virtually every industry; over 750,000 Illinois employees are employed by businesses which are members of the Illinois Chamber of Commerce. A substantial number of the Chamber's member businesses are

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[1] Pursuant to Sup. Ct. R. 37.6, the Illinois Chamber of Commerce states that no person or entity, other than *amicus curiae* and its counsel, has authored any part of this brief or made any monetary contribution in support of its preparation or submission. Petitioner Tractor Supply Company, an Indiana employer, is not a member of the Illinois Chamber of Commerce.

[2] Copies of the parties' executed letters of consent are being filed with the Clerk of this Court contemporaneously with this brief, consistent with Sup. Ct. R. 37.2(a).

unionized employers, which maintain collective bargaining agreements with their respective unions. Furthermore, many members' collective bargaining contracts contain agreements to arbitrate statutory employment discrimination claims. Consequently, the Chamber and its members have a substantial interest in the enforceability of collective bargaining agreement arbitration clauses that encompass statutory claims, and their interest has been adversely affected by the Seventh Circuit Court of Appeals' ruling in *Pryner v. Tractor Supply Company*, 109 F.3d 354 (7th Cir. 1997).

SUMMARY OF ARGUMENT

The Illinois Chamber of Commerce submits that this Court should grant Tractor Supply Company's Petition for Writ of Certiorari for two reasons:

- The divide among the Courts of Appeals over the Question Presented is destabilizing to labor relations, and undermines collective bargaining. In light of this Court's repeated pronouncements about the need for a uniform federal labor law to govern the interpretation of collective bargaining agreements, conclusive resolution of the Question Presented is all the more urgent.

- The Seventh Circuit's *Pryner* decision is in error, both legally and as it interprets federal labor policy.

ARGUMENT

I. IN LIGHT OF THIS COURT'S INSISTENCE ON A UNIFORM NATIONAL LABOR LAW, THE PETITION SHOULD BE GRANTED TO RESOLVE THE DAMAGING CIRCUIT SPLIT OVER THE QUESTION PRESENTED.

This Court has repeatedly emphasized the importance of uniformity in the law governing interpretation and enforcement of collective bargaining agreements. In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Company,* this Court wrote:

> More important, the subject matter of § 301(a) [29 U.S.C. § 185(a), creating federal jurisdiction over suits for violations of collective bargaining agreements] "is peculiarly one that calls for uniform law." The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to

> contract terms providing for final arbitral or judicial resolution of disputes.

369 U.S. 95, 103-04 (1962) (citations and footnote omitted).[3]

The threat to collective bargaining posed by competing systems of federal law – different law in different circuits – is no less significant than that posed by competing state and federal law. Especially in the case of employers with operations in different circuits, the existence of different (and with reference to the Question Presented, contradictory) systems for interpreting collective bargaining agreement language necessarily hampers the stability and efficiency of labor relations. Furthermore, it undermines collective bargaining because the same contract means different things in different circuits. Such uncertainty is a barrier to the consistent interpretation and enforcement of contract language, and creates a disincentive to the negotiation of broad arbitration clauses (even though arbitration is the favored method for resolving labor disputes).[4] Perhaps recognizing such a danger, this Court has noted:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what

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[3] *Cf., Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 681 (1983) (NLRA establishes uniform national labor law and policy governing unfair labor practices).

[4] *See, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

> the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law. . . .

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

At present, federal labor law is anything but uniform. The Courts of Appeals are split over the enforceability of collective bargaining agreement arbitration clauses that encompass statutory claims. The Seventh Circuit in the decision below, and the Eighth Circuit in *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997), have taken positions that are directly contrary to the Fourth Circuit's opinion in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885-86 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996). This circuit split has destroyed the uniformity of federal labor law in this area which so "peculiarly . . . calls for uniform law."[5] *Lucas Flour*, 369 U.S. at 103.

This sort of legal uncertainty, under which the same collective bargaining agreement means different things in

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[5] Furthermore, the circuit split may soon widen. The Third Circuit, in a decision since vacated and set for rehearing *en banc*, *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997), *vacated and reh'g granted*, ___ F.3d ___, No. 96-1746, 1997 WL 368629 (3d Cir. July 1, 1997), held that collective bargaining agreement arbitration clauses which encompass statutory claims are enforceable, provided that individual employees have access to the grievance and arbitration machinery independent of their unions. 114 F.3d at 427. In such a situation, the Third Circuit reasoned, any tension between individual and collective rights is attenuated by the fact that individual employees have the right to invoke arbitration unilaterally. *Id.*

different circuits, is antithetical to this Court's insistence on a uniform national labor law governing the interpretation of collective bargaining agreements. Furthermore, such uncertainty fosters litigation over where to litigate, thus destabilizing labor relations further. This Court should grant Tractor Supply Company's Petition, resolve this circuit split before it widens further, and restore uniformity to this area of law.

II. THE SEVENTH CIRCUIT DECIDED *PRYNER v. TRACTOR SUPPLY COMPANY* INCORRECTLY.

This Court also should grant Tractor Supply Company's Petition because the Seventh Circuit's opinion in *Pryner* is contrary to law and national labor policy.

Under Section 9(a) of the National Labor Relations Act, a duly-certified union is the exclusive representative of all members of the bargaining unit for purposes of collective bargaining over the terms and conditions of employment. 29 U.S.C. § 159(a). With the exception of considering and adjusting grievances in certain circumstances,[6] the employer may not bargain directly with individual union members over the terms and conditions of their employment; it must negotiate through the union, their exclusive bargaining representative. *Id. See also,* 29 U.S.C. §§ 158(a)(5) (unfair labor practice for employer not to bargain with union over terms and conditions of

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[6] Individual union members may meet and adjust grievances directly with their employers provided that (1) the applicable collective bargaining agreement does not prohibit such direct dealing; and (2) the union is permitted to attend the grievance meeting. 29 U.S.C. § 159(a).

employment), 158(d) (employers and unions are obligated to bargain in good faith over the terms and conditions of employment).

Collective bargaining topics are divided into three separate categories: mandatory, permissive, and illegal subjects of bargaining. *See, e.g., The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988); *Hill-Rom Company v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992). Employers and unions must negotiate over mandatory subjects of bargaining. *Id.* Furthermore, although they are allowed to negotiate over permissive subjects of bargaining, *id.*, they are prohibited from negotiating over illegal subjects of bargaining. *Id.* Illegal subjects of bargaining are "those proscribed by federal . . . law." *Hill-Rom Company*, 957 F.2d at 457. Because negotiating over illegal subjects is proscribed by law, any agreement regarding an illegal subject of bargaining is necessarily void and unenforceable.

Grievance and arbitration procedures are mandatory subjects of bargaining, about which employers and unions are required to negotiate. *See, e.g., Chicago Magnesium Castings Co. v. NLRB*, 612 F.2d 1028, 1034 (7th Cir. 1980); *NLRB v. Boss Manufacturing Co.*, 118 F.2d 187 (7th Cir. 1941); *United Electrical, Radio and Machine Workers v. NLRB*, 409 F.2d 150, 156 n.9 (D.C. Cir. 1969); *NLRB v. Independent Stave Co.*, 591 F.2d 443 (8th Cir. 1979), *cert. denied*, 444 U.S. 829 (1979); *Luden's Inc. v. Local 6, Bakery, Confectionery and Tobacco Workers' International Union*, 28 F.3d 347, 360 n.22 (3d Cir. 1994). In the face of the uniform rule that grievance and arbitration procedures are mandatory subjects of bargaining, however, the Seventh Circuit has carved out the following exception: any

grievance and arbitration procedure that purports to bind employees to arbitrate statutory employment discrimination claims is unenforceable, *i.e.*, it is an *illegal* subject of bargaining. There is no precedent for this exception, and the Seventh Circuit's ruling paradoxically places agreements to arbitrate statutory discrimination claims in the same category as, for example, collective bargaining agreements sanctioning race discrimination against employees, and union agreements to violate the duty of fair representation. *See, e.g., Local 1367, International Longshoremen's Association and Galveston Maritime Association*, 148 N.L.R.B. 897, 899-900 (1964).[7] Far from violating employees' rights (as with such other illegal subjects of bargaining, which are *per se* violations of the duty of fair representation and/or Title VII), arbitration clauses such as that in *Pryner* (or *Martin*) are just the opposite: they provide employees with an alternate (and perhaps more favorable)[8] forum in which to *enforce* their rights. It is difficult to imagine why such agreements would have the

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[7] Because Title VII prohibits employers and unions from discriminating against employees based on race, 42 U.S.C. §§ 2000e-2(a)(1)-(2); 2000e-2(c)(1)-(2), any collective bargaining agreement clauses sanctioning race discrimination are necessarily illegal subjects of bargaining. *Cf., Hill-Rom Company*, 957 F.2d at 457; *The Idaho Statesman*, 836 F.2d at 1400.

[8] Given the well-known and well-documented litigation backlog in the federal courts, arbitration is certainly a faster means of resolving discrimination claims than federal litigation. It is also less expensive (especially for employees, whose unions typically pay the arbitration expenses) and more accessible. Finally, it is a favored method of resolving discrimination claims under the Civil Rights Act of 1991. Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081.

same legal status as union agreements to violate their duties of fair representation, or collective bargaining agreements approving race discrimination. As such, the Seventh Circuit's decision in *Pryner* – which reaches just this result – is inconsistent with long-established federal labor law and policy.

Pryner also is inconsistent with federal labor law and policy because it discourages – in fact, prohibits – certain types of arbitration, whereas national labor policy encourages arbitration of labor-management disputes, and creates a strong presumption in favor of arbitrability. *See, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Furthermore, to the extent that *Pryner* permits unions to preclude employees from reaching their own individual agreements to arbitrate statutory discrimination claims, the Seventh Circuit goes too far. The Seventh Circuit writes:

> If the worker brings suit, the employer suggests that their dispute be arbitrated, the worker agrees, *and the collective bargaining agreement does not preclude such side agreements*, there is nothing to prevent binding arbitration.

109 F.3d at 363 (citations omitted, emphasis supplied). In other words, under *Pryner*, a union could actually prevent its members from executing voluntary "side agreements" to arbitrate statutory claims.[9] *Id.* As such, the

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[9] *Pryner*'s holding on this point paradoxically implies that although a union is prohibited from agreeing that its members will arbitrate their statutory claims, it is perfectly able to agree

Seventh Circuit's decision is far-reaching: not only is an agreement to arbitrate statutory discrimination claims an illegal subject of bargaining between the employer and the union, but it might also be an illegal subject of bargaining, as it were, between the employer and the individual employee. There is no precedent to support such a broad rule; in fact, the Seventh Circuit's rule flies in the face of this Court's holding that individual agreements to arbitrate statutory claims are fully enforceable and encouraged by the federal policy favoring arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-29 (1991).

Further adding to the anomaly the Seventh Circuit's holding creates, only union members (or employees in certified bargaining units) could be precluded from negotiating agreements to arbitrate their statutory claims. Non-union employees would remain completely free to negotiate such potentially advantageous agreements. Such a distinction between union and non-union employees has no basis in any law or policy. The Seventh Circuit simply invents it.

Finally, the lower court's conclusion in *Pryner* is premised largely on an assumed tension between individual and collective interests, in which the Seventh Circuit assumed that collective interests would predominate at the expense of individual rights. *See*, 109 F.3d at 362-63. Notwithstanding the problems inherent in the Seventh Circuit's assumptions, *see* Tractor Supply Company Pet.

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that its members will not consent to such arbitration on their own. 109 F.3d at 363.

for Cert., at 21-22, any such concern over a tension between individual and collective rights would be vitiated by an arbitration clause under which individual employees have unilateral access to the grievance and arbitration machinery.

Though purporting to recognize this possibility, 109 F.3d at 362, 363, the Seventh Circuit does not stop at such a resolution of the assumed tension. Rather, *Pryner* goes even further, and opines that the fundamental problem with collective bargaining agreement arbitration clauses encompassing statutory claims is not simply the availability of individual access to the grievance and arbitration machinery, but rather the union's inability to consent to arbitration in the first place. *See*, 109 F.3d at 363 ("We are not holding that workers' statutory rights are never arbitrable. They are arbitrable if the *worker* consents to have them arbitrated.") (emphasis supplied).[10] This focus on consent (rather than access) to arbitration is unnecessary to resolve the perceived tension between collective and individual rights. Individual access to the grievance and arbitration procedures would be sufficient to resolve the Seventh Circuit's concern over the perceived tension: if individual union members have the unilateral right to invoke arbitration (and the arbitrator is fully empowered to consider and adjudicate the statutory claims at issue), individual members' rights cannot be sacrificed by the union majority – unless the ability to litigate in federal

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[10] Under the Seventh Circuit's holding, of course, such individual consent to arbitration is contingent upon whether the union has negotiated a collective bargaining agreement precluding individual side agreements to arbitrate. *See supra* pp. 9-10.

court is a right in itself. This Court has ruled that it is not. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The Seventh Circuit's focus on consent to arbitration is important only if federal court litigation is a substantive right. If it were, then a union understandably could not agree to waive it for the employee. However, if federal court litigation is merely a means to enforce a substantive right (the right not to be subjected to race discrimination), then there is no reason why a union cannot consent for its members to an alternate method for enforcing that substantive right, provided that its members have access to such an alternate method of enforcement. Notwithstanding its acknowledgment that individual access to arbitration is important, 109 F.3d at 362, the Seventh Circuit's underlying focus on consent betrays an analysis that is fundamentally at odds with this Court's holding in *Gilmer* that federal court litigation is not a substantive right. 500 U.S. at 26. Furthermore, it is inconsistent with Congress' express encouragement of arbitration to resolve statutory discrimination claims. Pub. L. No. 102-166 § 118, 105 Stat. 1071, 1081. The Seventh Circuit's ruling cannot stand.

CONCLUSION

The Seventh Circuit's anomalous decision in *Pryner v. Tractor Supply Company* is contrary to law and federal labor policy. More importantly, however, under the law as it currently stands, the same collective bargaining agreement means different things in different circuits. By

increasing uncertainty as to the meaning and interpretation of collective bargaining agreements, this circuit split is antithetical to this country's express labor policy of "encouraging the practice and procedure of collective bargaining. . . . " 29 U.S.C. § 151. Such uncertainty is a barrier to collective bargaining because it increases the likelihood of disputes over the interpretation and enforcement of collective bargaining agreements, *see, Lucas Flour*, 369 U.S. at 103-04, and it breeds litigation over where to litigate. The current divide among the Courts of Appeals over the Question Presented is destabilizing labor relations, hampering collective bargaining, and harming employers, unions, and employees alike.

This Court should grant Tractor Supply Company's Petition For Certiorari, reverse the decision of the Seventh Circuit Court of Appeals, and restore urgently needed uniformity to this area of law.

Dated this 15th day of July, 1997.

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